89-932

No. _____

Supreme Court, U.S.
FILED
DEC 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JOHN AND DOROTHY ARRINGTON,

Petitioners,

vs.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

The Texas Open Beaches Act creates an enforcement mechanism by which the State's Attorney General may compel landowners along the Texas Gulf Coast to recognize easements imposed across their property and to remove all structures that may fall within the boundaries of that easement.

The question presented is:

1. Whether the Texas Open Beaches Act is subject to the constraints of the Fifth Amendment's takings clause.

LIST OF PARTIES

The parties to the proceedings below were the same as those before this Court. John and Dorothy Arrington were appellants in the Court of Appeals; Jim Mattox, the Texas Attorney General, was the appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioners, John and Dorothy Arrington, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Third Supreme Judicial District of Texas, entered in those proceedings on March 29, 1989.

OPINION BELOW

The opinion of the Third Court of Appeals is reported at 767 S.W.2d 957 (Tex.App. – Austin 1989, writ denied).

JURISDICTION

Under the Texas Open Beaches Act, Sec. 61.001 – 61.024,[1] TEX.NAT.RES.CODE, the respondent brought suit against the petitioners to enforce an easement over the petitioners' property. Summary judgment relief was granted respondent by the trial court, the 53rd District Court of Travis County, Texas, Judge Harley Clark, presiding.

Appeal was taken to the Court of Appeals for the Third Supreme Judicial District which affirmed the decision of the district court on March 29, 1989. That decision is reported as *Arrington v. Mattox* at 767 S.W.2d 957 (Tex.App.– Austin 1989, writ denied). Petitioners filed an application for writ of error in the Texas Supreme Court which was rejected by that court with the notation writ denied on September 6, 1989.

Jurisdiction in this Court is sought based upon 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in relevant part:

> No person shall be held . . . ; nor shall private property be taken for public use, without just compensation.

[1] At the time this lawsuit arose, the Open Beaches Act was codified at Secs. 61.001 through 61.024; Sec. 61.025 has now been added.

STATEMENT OF THE CASE

Petitioners have lived along the Texas Coast for a number of years. The home and lot they own borders the Gulf of Mexico; it is located near Galveston, Texas. The land and home had been owned for a number of years prior to August, 1983. In August, 1983, Hurricane Alicia struck Galveston Island and moved the natural vegetation line to a point landward of Petitioner's property.[2] Petitioners took certain steps to protect their property from further erosion, including the construction of a wooden bulkhead or retaining wall on the beach in front of their home, the construction of a chain link fence with a locked gate on top of that wall, the placement of sand on either side of the wall, and the placement of pieces of concrete, vegetation, a wooden boardwalk, and numerous Christmas trees. All of these steps were designed to facilitate the natural process by which a sand dune is built. The land upon which these items were constructed was landward of the vegetation line prior to the hurricane and the State had never expressed any interest in imposing the easement upon the property prior to August, 1983.

Respondent filed a suit, pursuant to the Open Beaches Act, seeking to enforce the public's easement across Petitioners' property. One of the defenses raised by Petitioner was that the action of the Respondent constituted a "taking" of his property in violation of the Fifth Amendment. The trial court rejected this defense and granted Respondent's Motion for Summary Judgment.

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[2] The vegetation line is defined statutorily as the "extreme seaward boundary of natural vegetation which spreads continuously inland." Sec. 61.001(2). TEX.NAT.RES.CODE.

767 S.W.2d at 958. The trial court ordered Petitioners to remove all of the items placed on the easement and enjoined them from any further activity that might interfere with the public easement. In addition, petitioners were ordered to pay a fifty dollar fine.

On appeal to the court of appeals, Petitioner's sole issue was that the action of the respondent violated the Fifth Amendment. The court of appeals held that there was "a fundamental distinction between a governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use."

> The Open Beaches Act does not empower the Attorney General to take rights from an owner of land, but merely furnishes a means for the public to enforce its existing collective rights.

Id. at 958.

The Supreme Court of Texas denied review on September 6, 1989.

Historical Development of the Open Beaches Act

The Texas Open Beaches Act, TEX.NAT.RES.CODE Secs. 61.001 et seq., was first construed in *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ.App. 1964 writ ref'd n.r.e.). There, the Court of Appeals held that the Act declared it to be the public policy of Texas that:

> the people of the State should have the free and unrestricted right of ingress and egress to and from the *State-owned* beaches bordering on the seaward shore of the Gulf of Mexico or such larger area extending from the line of mean low

> tide to the line of vegetation *in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continued right in the public.* The Article made it an offense against public policy for anyone to obstruct the way of ingress and egress or the use of the beaches. The Attorney General of Texas, a County, District, or Criminal District Attorney were given authority to bring suits on behalf of the people of Texas, and it was made their duty to do so, to require removal of any obstructions that may interfere with such right of ingress and egress.

375 S.W.2d at 925-26. (emphasis in original).

The *Seaway* court defined the beach as that area between the line of mean low tide and the seaward side of the vegetation line. The line of vegetation was defined in the Open Beaches Act, (then Art. 5415d, V.A.C.S.), – "the extreme seaward boundary of natural vegetation which spread continuously inland."[3]

The court found the Act constitutional, because other than the definitions of "beach" and "line of vegetation", the statute was used only as an enforcement mechanism. While the statute created certain presumptions, they were

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[3] The Court noted that the appellants had argued that the beach was only the area between mean low tide and mean high tide under common law. 375 S.W.2d at 928. Nevertheless, the Court adopted the statutory definition as controlling. See 375 S.W.2d at 930.

not used in *Seaway*, according to the court.[4] 375 S.W.2d at 930.[5]

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[4] The presumption was Section 2 of the Act as it existed then. Art. 5154d, Sec. 2, V.A.C.S. Where property was shown to be between the line of mean low tide and the line of vegetation, the title owner did not have the right to exclude the public from using the area and "there has been imposed upon the area subject to the proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea." The presumption is now found at Sec. 61.020, TEX.NAT.RES.CODE.

[5] The Court described the beach as flat and smooth with a width of several hundred feet between the line of mean low tide and the line of vegetation. The line of mean high tide did not reach the vegetation line. 375 S.W.2d at 930. The tides, on occasion, reached the line of vegetation.

> As we understand it, the absence of vegetation is caused largely by the fact that the salty waters of the sea cover the area with frequency that suffices to prevent growth of vegetation. When we speak of high water and high tides we are not referring to height produced by storms. As a matter of fact, high waters produced by storms inundate the upland far above the vegetation line. However, these storm-produced high waters do not occur with such frequency and do not remain on the vegetation line sufficiently long to destroy it or the identifiable line it forms along the beach.

. . . .

> There is testimony that the beach and line of vegetation are stable and that this beach and vegetation line are two hundred or more years old. This is the testimony of experts. Some laymen familiar for many years with these features, based on their observation, confirm the experts as to the stability of the beach

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The court then found the evidence sufficient to sustain the judgment on the theory that the beach had been dedicated by the predecessors in title.

In *Matcha v. Mattox*, 711 S.W.2d 95 (Tex.App. – Austin, 1986 writ ref'd. n.r.e.; cert. denied), the State pleaded, not a stable vegetation line, as in *Seaway*, but a migratory one creating a moving public easement. The Court agreed that such an easement was permitted. This was the first case to construe a post-Alicia case. In *Feinman v. State*, 717 S.W.2d 106 (Tex.App. – Houston [1st], 1986 writ ref'd n.r.e.), the second post-Alicia case, the Court found that the State was proceeding under the Open Beaches Act, that the easement was imposed under that statute, and

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> and line of vegetation. There is testimony that while there is, particularly from storms, some erosion on the beach and at points on the vegetation line, such is temporary and the beach and the line of vegetation through the work of nature rebuild in relatively short times. The waters and winds rebuild the beach with sand and the vegetation grows from roots that are shown by the testimony not to be destroyed by storms. The vegetation line effectively marks the sandy beach from the upland which is covered by a continuous spread of vegetation inland.

375 S.W.2d at 931. The *Seaway* Appellants argued that erosion on the beach changed the location of the various boundaries. The Court found sufficient evidence to support the jury's findings of no net erosion and that the beach was the same as ever. " . . . we think the evidence clearly shows the line of vegetation has remained the same for at least two hundred years." 375 S.W.2d at 939. Thus the use of the vegetation line as a boundary was not void for vagueness because it was a well defined and stable physical feature. Id. See also *Moody v. White*, 593 S.W.2d 372 (Tex.Civ.App. – Corpus Christi, 1979).

that the statute contemplated a rolling easement. 717 S.W.2d at 108-09. Finally, in the instant case, the Court again sustained a constitutional challenge to the Open Beaches Act, holding that the State was not imposing an easement but merely seeking an adjudication of the public's rights.

REASONS FOR GRANTING THE WRIT

1. The Texas Courts' adoption of an easement theory under which no takings analysis is required is in direct contradiction to prior opinions of this Court.

The opinion of the Texas Court contradicted both prior holdings of this Court and holdings of the various federal Courts of Appeals when it held that the action was not one of sovereign action but one of the public asserting rights it had long held. "Takings" litigation is not limited to those governmental actions that result in expropriation of property for governmental use; it also applies when the governmental action deprives a private party of his property for public use. Public use turns on the actual purpose for which the property is taken and not on the identity of the operator. *Fourtnoy v. MARTA*, 678 F.2d 1038 (11th Cir. 1983), citing *LacCourte v. FRC*, 510 F.2d 198, 207, n. 36 (DC Cir. 1975).

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982), the Court quoted from Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1184 (1967):

> The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, *or the public at large*, 'regularly use' or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership. (emphasis added).

102 S.Ct. at 3171, fn. 5. The Court later noted the following:

> The City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central's* [*Penn Central Transportation Co. v. New York City*, 98 S.Ct. 2646 (1978)] reference to a physical invasion "by government", (citation omitted) and argue that a similar invasion by a private party should be treated differently. We disagree. A permanent physical occupation *authorized by state law* is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.

102 S.Ct. at 3174, fn. 9.[6]

In the case at bar, the petitioners' taking claim satisfies both arguments set forth above: their property is being put to public use and the principal enforcement

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[6] In *Loretto*, neither of the parties was a state agency; instead, the plaintiff/landlord argued that a state statute which permitted Cable TV Companies to run access lines down the sides of apartment buildings constituted a taking under the Fifth Amendment; this Court agreed. When the nature of the governmental action is a permanent physical occupation of property, this Court's cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. 102 S.Ct. at 3175.

mechanism is a state statute enforced by the Texas Attorney General. As *Seaway* noted, the State did not rely on a common law theory of beach but the statutory definition. See now TEX.NAT.RES.CODE. ANN. Sec. 61.014. The concept of vegetation line is also a product of statutory creation. See footnote 2, supra. The Attorney General has always admitted that he brought his enforcement actions as Attorney General pursuant to the Open Beaches Act, TEX.NAT.RES.CODE Secs. 61.001 et seq. That is the only statute that permits enforcement of the public easement. Thus, it is clear that the governmental action requirement is satisfied and that a takings analysis must be applied. See *Penn Central* supra, (the reviewing court must examine the nature of the government action to determine whether it is a taking; such a taking can be more easily found if the property interference is a physical invasion by government. 96 S.Ct. at 2659).

This analysis is consistent with state action analysis in the context of other constitutional issues. In *Ginn v. Mathews*, 539 F.2d 477 (9th Cir. 1976), the court held that where the state acts directly or even indirectly and its influence is strong, constitutional restraints must be observed. In *Jeffires v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir. 1982), the Court held that if the government affirmatively facilitates, encourages, or authorizes the objectionable practice, it is state action for purposes of the Fifth Amendment. In *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340, 1345 (1988), the Court held that when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. In the case at bar, that is clearly satisfied when the Texas Attorney General seeks

to use the enforcement mechanism of a state statute to convert what was formerly privately owned land to public use.

Additionally, the Texas Courts erred when they held that a Fifth Amendment analysis was not required because the State made no use of the statute's presumption but merely relied upon the statute's definitions. The statute altered the rights of the various parties from their position at common law. Because the land in question was originally deeded after the Republic of Texas adopted common law, it is to the common law, rather than the Spanish civil law, the Court must look for its answer. See and compare *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex.Civ.App. – Houston, 1964 writ ref'd n.r.e.) with *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958). At common law, the extent of the State's easement was determined by the line of mean high tide. *Seaway, supra.*

Traditionally, at common law, the public beach or shore was defined as the area between the lines of mean low and mean high tides.[7] In *Dincans v. Keeran*, 192 S.W.2d 603 (Tex.Civ.App. – San Antonio 1917), the plaintiffs sued defendants for trespass because of their camping along the shore line of the navigable stream.[8] The trial

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[7] Mean high tide was accepted as the landward boundary of the tidelands, at common law, in *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23 (1935). Mean high tide was defined as the average height of all the high waters at that place over a considerable time period, established at 18.6 years. 296 U.S. at 26-7.

[8] Because the original title in this case passed in 1833, prior to the adoption of the common law, civil law controlled

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court had ordered the appellants not to trespass within the appellee's pasture inclosure which included the land between the low and high tide. See also *Hynes v. Packard*, 45 S.W. 562. The Court of Civil Appeals held that both parties enjoyed coequal rights with the other. Neither could enjoin the reasonable use of the shore by the other. The Court found that hunting, camping, and fishing were reasonable uses of the shore line, and the State had no power to convey an exclusive right to the shore line to any private party. Id. at 605. The trespass judgment as to the other lands was upheld.

Thus, whether at common law or at civil law, the State recognized the public shore or easement as either the area between the line of mean low and mean high tide or the area between the low and the highest tide.

The Open Beaches Act altered that common law definition by permitting the Attorney General to enforce an easement created across the sand by prescription, common use, etc. up to the line of vegetation. See *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex.Civ.App. – Houston, 1964 writ ref'd n.r.e.). The Court rejected the argument that the land was granted to private owners impressed with a potential easement:

> We do not know that we clearly comprehend the appellee's position that the judgment can be upheld on the theory that the use of the beach by the public has become a part of our tradition

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and, therefore, the boundary was the line marked by the highest tide of the navigable waters, which were affected by the ebb and flow of the tide from the Gulf of Mexico through intervening bays. 192 S.W.2d at 604.

> and common law and the easement exists by reason of continuous right in the public. We suppose they seek to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power to cut off convenient access. We know of no such rule of law. In our extensive research we have found no cases so holding nor have any been cited us. In some cases the expression is used that the sovereign holds the seashore for use by the members of the public. We think this is true but this is far from holding that grants by the sovereign of land above the seashore are impressed by implication with a reserved easement in favor of the public to furnish access by land to the shore.

375 S.W.2d at 929. Thus, the lands in question were not subject to the implied reversion of the public trust of their predecessors in title, the original grantee.

The Court, in *Seaway*, noted that the appellants had argued that the beach was only the area between mean low tide and mean high tide under common law. 375 S.W.2d at 928. Nevertheless, the Court adopted the statutory definition, all property up to the vegetation line, see TEX.NAT.RES.CODE. ANN. Sec. 61.014., as controlling. See 375 S.W.2d at 930.

Additionally, common law easements in Texas typically do not mandate in every case the removal of all obstructions. They require only that the holder of the dominant estate be not unreasonably impeded or obstructed in the use and enjoyment of his easement. See ***Arden v. Boone,*** 221 S.W. 265 (Tex.Com.App. 1920); *Gillett* ***v. Van Horne,*** 36 S.W.2d 305 (Tex.Civ.App. – El Paso, 1931

error dismissed). Under the Open Beaches Act, however, all obstructions and impediments must be removed without any inquiry as to whether the public's use is unreasonably impeded. Sec. 61.011, TEX.NAT.RES.CODE, mandates that the public shall have free and unrestricted access to the public beach. Sec. 61.013, TEX.NAT.RES.CODE makes it an offense against public policy for a person to create or construct *any* obstruction, barrier, or restraint. Thus, the terms of the Open Beaches Act again substantially modified the rights of both the public and the landowners as they existed prior to its enactment.[9]

What is clear from this discussion is that the Open Beaches Act has altered the property rights of owners of beachfront property. Prior to the Open Beaches Act, landowners had the power to exclude the public from all shore areas except between the lines of mean low and mean high tides. See *Dincans, supra.* By this alteration and creation of an enforcement mechanism in the Attorney General's office, the Fifth Amendment takings clause is violated.[10] It is the statute's own terms that give rise to its operation and enforcement.

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[9] In the case at bar, petitioners introduced, as part of their summary judgment evidence, a survey, prepared by a Galveston County surveyor, Andrew Johnson, demonstrating that there was more than two hundred feet of beach between the dunes and other items constructed by the petitioners and the line of mean low tide.

[10] Even if, as recognized in *Seaway*, the public could acquire its easement by common law methods, such a

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Further, the use of the rolling easement concept, in and of itself, violates the takings clause. Prior to August, 1983, the public easement and the plaintiffs property existed side by side in relative harmony. The arrival of Hurricane Alicia in August, 1983 altered the boundary of the public easement, the vegetation line, and moved it over "on top of" plaintiffs' property. Thus, their property became subject to the public easement, not by governmental action, but by a sudden force of nature. This, according to the court below, was sufficient to take it outside the scope of the Takings Clause.

In *Kaiser Aetna v. United States*, 100 S.Ct. 383 (1979), this Court held otherwise. Kuapa Pond, in Hawaii, owned by the petitioners there, was a shallow lagoon separated from the bay and Pacific Ocean by a barrier beach. It was privately owned. Petitioners converted the pond into a marina and, by connecting it to the bay where, according to the U.S., it became subject to the navigational servitude of the Federal Government. Thus, the public had a right of access to what was formerly a

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prescription, etc., without violating the constitution, those theories would not apply to the petitioners. The State has made no effort, nor can it make any plausible showing, that prescription, etc. has ever operated upon the petitioners' property. The State's theory is that once the vegetation line is established as the boundary of the easement, it becomes the boundary wherever it goes. Landowners who, suddenly, find their property seaward of that line, as in the case of a hurricane or storm, can be compelled to tear down their property so that the easement creating forces can then operate. By this placement of the proverbial cart before the horse, the Fifth Amendment is violated.

private pond. Prior to the government's enforcement of its navigational servitude, the Kaiser-Aetna excluded the public from the marina. The Government contended that the public could not be so excluded because the public enjoyed a federally protected right of navigation over the navigable waters of the United States. 100 S.Ct. at 387. The source of this servitude was an inherent sovereign power of the Commerce Clause. That it was once fast land made no difference; when Kaiser Aetna made it navigable, the navigational servitude went with that expansion.

This Court did not question the power of the Government to enforce the navigational servitude as part of its Commerce Clause power; whether that amounts to a taking was and is a different issue. 100 S.Ct. at 390. The Court held that the attempt to create public access to the pond amounted to a taking. The Court found it clear that prior to the dredging by Kaiser Aetna, the pond was incapable of being navigable and had always been considered private property. Thus, it could not be argued that the land now subject to the easement was part of the prior "great navigable stream" previously recognized by the Court. Id. The imposition of the servitude amounted to a physical invasion of the property for which the government must pay just compensation. 100 S.Ct. at 393.

Similarly, in the case at bar, plaintiffs' property was not part of the public beach prior to Hurricane Alicia. Thus, it was not subject to the type of "easement creating forces" the Court found so persuasive in *Seaway*, supra.[11]

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[11] There was no evidence that anyone had camped on plaintiffs' property, ever walked on it, parked on it, etc. The

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What subjected petitioners' property to the easement was the sudden shifting in the easement boundary, the vegetation line, at the "hands" of Alicia. The imposition of the already existing public easement onto petitioners' property constitutes a taking in the same manner that the imposition of the navigational servitude over Kaiser Aetna's pond constituted taking in that case.

Finally, it is clear that the imposition of an easement is a taking even if it is de minimis. It is nothing more than a physical invasion of the property. See *Lorretto v. Manhattan CATV*, supra; *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987).[12]

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only evidence was that, just as in every open beach case, the public had used the beach up to the line of vegetation.

[12] Under *Nollan*, there is no doubt that the conduct is a taking:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice Brennan contends) "a mere restriction on its use," (citation omitted), is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such

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2. The adoption of the easement theory is in conflict with the appellate decisions of some of the sister states

The rights of the public and the rights of property owners are not in irremediable conflict. In *Mathews v. Bay Head Improvement Assoc.*, 471 A.2d 355 (N.J. 1984), the New Jersey Supreme Court was confronted with a similar problem. Recognizing the public's right to use municipally owned dry beaches, the issue before them was the public's right to use privately owned dry beaches.[13] 471 A.2d. at 363. The Court held that both interests must be accommodated:

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> interests, so long as it pays for them. (citation omitted). *Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it,* but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' . . . We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

107 S.Ct. at 3145. (emphasis added).

[13] Dry beach in New Jersey is defined as that area landward of the line of mean high tide up to the vegetation line, or, if no vegetation line, to a seawall, road, parking lot, or boardwalk. 471 A.2d at 358, fn. 1.

> Exercise of the public's right to swim and bath below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

471 A.2d. at 364. The Court rejected the concept of prescription; "[a]rchaic judicial responses are not an answer to a modern social problem." Id. at 365. The solution in each case had to depend upon a balancing of the rights of the parties, both private and public, to accommodate both interests. Id.

Thus, courts of two states have analyzed the same problem and reached contradictory constitutional results.

Because the Open Beaches Act does not allow for such flexibility, but impels the destruction of the plaintiff's private property rights, it is unconstitutional.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted. Petitioners respectfully pray that this Court grant their Petition, set this case for full briefing on the merits and oral argument and, upon final consideration grant them their requested relief.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

JUDGMENT RENDERED MARCH 29, 1989

NO. 3-88-086-CV

JOHN ARRINGTON, ET UX. V. HONORABLE JIM MATTOX, ATTORNEY GENERAL OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS APPEAL FROM 53RD DISTRICT COURT OF TRAVIS COUNTY BEFORE CHIEF JUSTICE SHANNON, JUSTICES CARROLL AND ABOUSSIE AFFIRMED – OPINION BY JUSTICE ABOUSSIE

THIS CAUSE came to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that the appellants, John Arrington and Wife Dorothy Arrington, as principles, and Lawyers Surety Corporation, as surety on the appeal bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

NO. 3-88-086-CV

JOHN ARRINGTON, ET UX.,
APPELLANTS

vs.

HONORABLE JIM MATTOX, ATTORNEY GENEARL OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS,
APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT NO. 353,498,
HONORABLE HARLEY CLARK, JUDGE PRESIDING

Appellants John and Dorothy Arrington appeal the granting of a summary judgment by a district court of Travis County in an "open beaches" suit. *See* Tex. Nat. Res. Code Ann. §§ 61.001-61.025 (1978 & Supp. 1989) (the Open Beaches Act). The judgment prohibits appellants from interfering with the public's right of free access over the beach adjacent to their property which is seaward of the natural vegetation line. We will affirm the judgment.

Appellants own a lot and home facing the Gulf of Mexico in the Bermuda Beach subdivision on West Beach, Galveston Island, Texas. In August 1983, Hurricane Alicia struck the Texas coast and moved the vegetation line to a point landward of appellants' property. Appellants then built a wooden bulkhead or retaining wall on the beach in front of their home. They erected a chain link fence and locked gate on top of the wall and placed sand fill on

either side of it. On the seaward side of the wall, they placed pieces of concrete, vegetation, a wooden boardwalk, and numerous Christmas trees. Appellants admit that they could not have constructed these improvements on the seaward side of the vegetation line as it existed before the hurricane.

The Attorney General filed suit on behalf of the public pursuant to the Open Beaches Act. He alleged that a public easement and right of use existed on the seaward side of the natural vegetation line across appellants' property, and that appellants had encroached upon that right of use by placing structures and objects on the easement.

The district court granted the Attorney General's motion for summary judgment and concluded that:

> (1) The public has acquired through prescription, dedication and custom a right of use or easement to, upon, across and over that portion of the above-described property that is situated and that may come by natural processes to be situated between the line of mean low tide and the natural line of vegetation spreading continuously inland. The area between these two natural boundaries is the beach as defined at common law and in Tex. Nat. Res. Code §§ 61.001-61.025.
>
> (2) This public right of use or easement lies seaward of the natural line of vegetation and is for the free and unrestricted right of passage on and over the beach to and from the waters of the Gulf of Mexico and for travel as a public way parallel to the Gulf waters, and for free and unrestricted lawful use and enjoyment for swimming, fishing, boating, camping, beachcombing, and similar recreational activities.

> (3) This public right of use or easement migrates and moves landward or seaward with the natural movements of the natural line of vegetation and the line of mean low tide. This easement adheres at all times to the shore and follows the line of mean low tide and the natural line of vegetation where ever those two lines may be located by the natural processes at any given time.

The court further found that appellants caused "obstructions, barriers, restraints, and interferences in the public beach easement recognized by this judgment, contrary to the common law right of the public" and to Tex. Nat. Rec. Code Ann. to build a new house on their beachfront property in California unless they granted an easement to the public on the land between the historic mean high tide mark which bounded their property and their seawall. The United States Supreme Court found that this scheme constituted a taking and ordered that the Nollans be compensated. The California Coastal Commission sought to *establish* an easement across land belonging to the Nollans in exchange for the permit where no easement had previously existed, unlike the present case, where the court merely *enforced* an already existing public easement established by custom, prescription, or public dedication.

Appellants further claim that the easement is a "regulatory taking," relying on First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S.Ct 2378 (1987). In *First English*, a county implemented a flood plain ordinance which prohibited a church camp from rebuilding structures destroyed by a flood. The question before the Court was whether the "temporary"

regulatory taking of property (between the time of the imposition of the ordinance and the invalidation of the ordinance as unconstitutional) would entitle the landowners to damages. No public easement was involved, and the Court never reached the issue whether the ordinance was an unconstitutional taking. Appellants' reliance on *Nollan* and *First English* is misplaced. We overrule appellants' point of error.

The judgment of the trial court is affirmed.

Marilyn Aboussie, Justice

[Before Chief Justice Shannon, Justices Carroll and Aboussie]

Affirmed

Filed: March 29, 1989

[Published]

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 6, 1989

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RE: Case No. C-8766

STYLE: JOHN ARRINGTON ET UX.
v. JIM MATTOX, ATTORNEY GENERAL

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

By /s/ Blanca E. Morin
Deputy

SUBCHAPTER A. GENERAL PROVISIONS

Section 61.001. Definitions

In this chapter:

(1) "Department" means the Parks and Wildlife Department.

(2) "Line of vegetation" means the extreme seaward boundary of natural vegetation which spreads continuously inland.

(3) "Highest wave" means the highest swell of the surf with such regularity that vegetation cannot grow and does not refer to the extraordinary waves which temporarily extend above the line of vegetation during storms and hurricanes.

(4) "Littoral owner" means the owner of land adjacent to the shore and includes anyone acting under the littoral owner's authority.

(5) "Public beach" means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

§ 61.011. Public Policy

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public

has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

§ 61.012. Definition

In this subchapter, "beach" means state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

§ 61.013. Prohibition of Obstructions

(a) It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively:

(1) to enter or to leave any public beach; or

(2) to use lawfully and legally any public beach or any larger area abutting on or contiguous to a public beach if the public has acquired a right of use or easement to or over the area by

prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) For purposes of this section, "public beach" shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public since time immemorial as recognized by law or custom. This definition does not include a beach which is not accessible by a public road or public ferry.

(c) A person who creates, erects, or constructs an obstruction, barrier, or restraint in violation of Subsection (a) of this section is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

(d) This section does not apply to any obstruction, barrier, or restraint placed on an area defined in Subsection (a) of this section by a county under Chapter 63 of this code for the purpose of establishing or reestablishing sand dunes.

Amended by Acts 1979, 66th Leg., p. 1607, ch. 681, § 2, eff. Aug. 27, 1979; Acts 1983, 68th Leg., p. 4818, ch. 850, § 1, eff. June 19, 1983.

1979 Amendment. Designated former text as subsec. (a); in subd. (1) thereof, substituted "public beach" for "state-owned beach *** in the public"; in subd. (a)(2), substituted "public beach or any larger area" for "property" and "a public beach if the public had acquired a right of

use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public" for "the state-owned beach bordering on the seaward shore of the Gulf of Mexico on which the public has acquired a prescriptive right"; and added subsecs. (b) and (c).

1983 Amendment. Added subsec. (d).

§ 61.014. Denial of Access by Posting

(a) As used in this section, "public beach" means the area extending from the line of mean low tide of the Gulf of Mexico to the line of vegetation bordering on the Gulf of Mexico, or to a line 200 feet inland from the line of mean low tide, whichever is nearer the line of mean low tide, if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) Any person who displays or causes to be displayed on any public beach any sign, marker, or warning, or who shall make or have made any written or oral communication which states that the public beach is private property or who states in any other manner that the public does not have the right of access to the public beach in violation of the lawful access rights of the public guaranteed by this subchapter, shall be fined not less than $10 nor more than $200.

(c) Each day that the communication is made constitutes a separate offense.

(d) Any person who violates the provisions of this section shall be prosecuted in the county in which the public beach is located.

(e) This section does not apply to any island or peninsula that is not accessible by public road or common carrier ferry facility so long as the condition exists.

§ 61.015. Satisfaction of Ingress and Egress Requirement

The requirement of free and unrestricted right of ingress and egress over an area landward of the line of vegetation is considered fully satisfied by access roads or way which are in existence now and available to the public or which by or with the approval of any governmental authority having jurisdiction may be provided in the future.

§ 61.016. Boundaries for Areas With No Marked Vegetation Line

(a) To determine the elevation reached by the highest waves of the Gulf of Mexico, in any area in which there is no clearly marked vegetation line (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.

(b) The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side.

(c) If the elevation of the two points on each side of the area are not the same, the extension defining the line reached by the highest waves of the Gulf shall be the average elevation as between the two points, but if there is no clearly marked line of vegetation, the extended line shall not extend inland further than 200 feet from the seaward line of mean low tide.

§ 61.017. Line of Vegetation Unaffected by Certain Conditions

(a) The "line of vegetation" is not affected by the occasional sprigs of salt grass on mounds and dunes or seaward from them and by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area.

(b) If the changes listed in Subsection (a) of this section are made and the vegetation line is obliterated or is created artificially, the line of vegetation shall be determined in the same manner as in those areas covered by Section 61.016 of this code, but if there is a vegetation line consistently following a line more than 200 feet from the seaward line of mean low tide, the 200-foot line shall constitute the landward boundary of the area subject to public easement until a final court adjudication establishes the line in another place.

§ 61.018. Suit to Remove Obstructions

(a) The attorney general or any county attorney, district attorney, or criminal district attorney shall file in a district court of Travis County, or in the county in

which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restricts the right of the public, individually or collectively, to free and unrestricted ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.

(b) In the same suit, the attorney general, county attorney, district attorney, or criminal district attorney may seek recovery of the costs of removing any obstruction or barrier if it is removed by public authorities pursuant to an order of the court.

§ 61.019. Declaratory Judgment Suits

(a) A littoral owner whose rights are determined or affected by this subchapter may bring suit for a declaratory judgment against the state to try the issue or issues.

(b) Service of citation on the state shall be made by serving the citation on the attorney general.

§ 61.020. Prima Facie Evidence

In a suit brought or defended under this subchapter or whose determination is affected by this subchapter, a showing that the area in question is located in the area from mean low tide to the line of vegetation is prima facie evidence that:

(1) the title of the littoral owner does not include the right to prevent the public from

using the area for ingress and egress to the sea; and

(2) there is imposed on the area, subject to proof of easement, a prescriptive right or easement in favor of the public for ingress and egress to the sea.

§ 61.021. Area Not Covered by Subchapter

None of the provisions of this subchapter apply to beaches on islands or peninsulas that are not accessible by a public road or ferry facility for as long as the condition exists.

§ 61.022. Exemption for Certain Structures

The provisions of this subchapter do not prevent any agency, department, institution, subdivision, or instrumentality of this state or of the federal government from erecting or maintaining any groin, seawall, barrier, pass, channel, jetty, or other structure as an aid to navigation, protection of the shore, fishing, safety, or other lawful purpose authorized by the constitution or laws of this state or the United States.

§ 61.023. Effect on Land Titles and Property Adjacent to and on Beaches

The provisions of this subchapter shall not be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach bordering on the seaward shore of the Gulf of Mexico or to the continuation of fences for the retention of livestock across sections

of beach which are not accessible to motor vehicle traffic by public road or by beach.

§ 61.024. Effect of Subchapter on Definition of Public Beach

None of the provisions of this subchapter shall reduce, limit, construct, or vitiate the definition of public beaches which has been defined from time immemorial in law and custom.